

SQUIRE SANDERS & DEMPSEY L.L.P.  
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Attorneys for Defendant  
ECHOSTAR SATELLITE CORPORATION

E-filing

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SUNUP DESIGN SYSTEMS, INC.,

Plaintiffs,

vs.

ECHOSTAR SATELLITE  
CORPORATION, an Colorado  
corporation; and DOES 1-20,

Defendants.

Case No.

[Santa Clara Superior Court Case No.  
CV801155]

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1441, 1446, Defendant EchoStar Satellite Corporation ("Defendant") hereby removes this action to the United States District Court for the Northern District of California.

JURISDICTION

This Court has removal jurisdiction over this case pursuant to 28 U.S.C. §§ 1441 and 1332 as discussed in further detail in paragraphs 1 through 8 below.

INTRA-DISTRICT ASSIGNMENT

Assignment to the San Jose Division of this Court is appropriate under Civil Local Rule 3-2(e) because the Plaintiffs in this action have alleged that a substantial part of the events or omissions giving rise to their claims occurred in Santa Clara County.

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NOTICE OF REMOVAL  
Case No. \_\_\_\_\_

SF #: 49439v1

## BASIS FOR REMOVAL

Removal is proper for the following reasons:

1. Under 28 U.S.C. § 1441(a), "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

2. This action is pending in the Superior Court of the State of California for the County of Santa Clara. The United States District Court for the Northern District of California embraces the Santa Clara County Superior Court within its jurisdiction.

3. The Complaint was filed on or about August 31, 2001. A copy of the Complaint is attached hereto as Exhibit A.

4. Plaintiff mailed a copy of the Summons and Complaint by first class mail postage prepaid to EchoStar Technologies Corporation, 90 Inverness Circle East, Englewood, CO 80112. The Summons and Complaint were mailed on August 31, 2001 from Palo Alto, CA. A copy of the summons received by EchoStar Technologies Corporation is attached hereto as Exhibit B.

5. This Notice of Removal is filed prior to the expiration of thirty days after Defendant received Plaintiff's Complaint, and is therefore timely under 28 U.S.C. § 1446(b).

6. Defendant does not waive any objections or defenses it may have by filing this Notice of Removal, including challenges to personal jurisdiction and/or service of process. *Clark v. Wells*, 203 U.S. 164 (1906).

7. This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332 for the following reasons:

a. Plaintiff's Complaint alleges causes of action against Defendant for: (1) breach of contract (Complaint ¶ 17-29), (2) breach of implied covenant of good faith and fair dealing (Complaint ¶ 30-35), (3) indebitatus assumpsit (Complaint ¶ 36-39), (4) quantum meruit, (Complaint ¶ 40-44), (5) intentional misrepresentation (Complaint ¶ 45-51), (6) negligent misrepresentation (Complaint ¶ 52-56) and (7) unfair business practices violation of California Business & Professions Code § 17200 (Complaint ¶ 57-59) all relating to EchoStar's alleged

1 failure to sign a "definitive" agreement in this case.

2 b. Plaintiff alleges that "EchoStar executed a Memorandum of Startup  
3 ("MOS") agreeing to pay SunUp more than \$1.39 million . . ." (Complaint ¶ 1) and that  
4 Defendant breached that agreement. Plaintiff has also prayed for damages of "at least  
5 \$1,152,200" on its first through third causes of action (Complaint ¶ 29, p.12 ¶ A); and damages  
6 of "at least \$1,285,000" on its fourth through sixth causes of action (Complaint ¶ 35, p.12 ¶ B).  
7 Therefore, the amounts sought by Plaintiff exceed \$75,000, and the jurisdictional amount in  
8 controversy set forth in 28 U.S.C. § 1332(a) is satisfied. *Mangini v. R.J. Reynolds Tobacco Co.*,  
9 793 F.Supp. 925, 928 (N.D. Cal 1992).

10 c. EchoStar Satellite Corporation is a corporation organized and existing under  
11 the laws of Colorado, with its principal place of business in Littleton, Colorado, and is therefore  
12 considered a citizen of the state of Colorado pursuant to 28 U.S.C. § 1332(c)(1). Plaintiff's  
13 Complaint alleges and admits that "EchoStar is organized and exists under the laws of the state of  
14 Colorado. It has its principal place of business in Englewood, Colorado." (Complaint ¶ 3).

15 d. SunUp Design Systems, Inc. alleges and admits that it is a "privately held  
16 software company formed in or about April 1992 with its principal place of business in San Jose,  
17 California." (Complaint ¶ 2). Defendant is informed and believes, and therefore alleges, that  
18 Plaintiff is a citizen of the state of California. Complete diversity, therefore, exists between  
19 Plaintiff and Defendant in this action.

20 8. Pursuant to 28 U.S.C. § 1446(d), promptly after filing this Notice of Removal,  
21 Defendant will give written notice hereof to Plaintiff and will file a copy of the Notice with the  
22 Clerk of the Santa Clara Superior Court.

23 9. Attached hereto as Exhibit C is a copy of the remainder of the documents from the  
24 state court action that have been served on Defendant.

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1 WHEREFORE, Defendant hereby removes the above-captioned action now pending in the  
2 Superior Court of California for the County of Santa Clara from that court to this Court.

3 Dated: September 28, 2001

SQUIRE SANDERS & DEMPSEY L.L.P.

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5 By: 

Mark C. Dosker

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7 Attorneys for Defendant  
ECHOSTAR SATELLITE CORPORATION  
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**PROOF OF SERVICE**

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is One Maritime Plaza, Suite 300, San Francisco, California 94111.

On September 28, 2001, I served the documents described as:

**NOTICE OF REMOVAL**

on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as set forth below:

Patricia Nicely Kopf  
Patrick E. Premo  
FENWICK & WEST LLP  
Two Palo Alto Square  
Palo Alto, CA 94306

[XX] (BY U.S. MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on September 28, 2001, at San Francisco, California.

  
Johnette P. Smith